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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(**HONORABLE THOMAS J. WHELAN**)

UNITED STATES OF AMERICA, Plaintiff, v. NICOLAS CESAREO, Defendant.	CASE NO. 08CR0201-W DATE: June 23, 2008 TIME: 2:00 p.m. SUPPLEMENTAL REPLY TO GOVERNMENT'S SUPPLEMENTAL RESPONSE TO THE MOTION TO DISMISS INDICTMENT

INTRODUCTION

On April 29, 2008, Mr. Cesareo filed a motion to dismiss the indictment due to an invalid deportation. On the date of the hearing, the government asked for a 30-day continuance to have sufficient time to respond. The government then filed a response on June 12, 2008, the Thursday before the Monday hearing. Mr. Cesareo filed a reply the next day on June 13, 2008. The Court continued the hearing by one week to read the papers filed.

The government then filed a response to the reply on June 20, 2008, the Friday before the Monday hearing. Mr. Cesareo feels compelled to file a reply because the government's response confuses the law and the issues in this case.

SUPPLEMENTAL REPLY TO GOVERNMENT'S ARGUMENTS

A. Stipulated Removal

Mr. Cesareo argues that the stipulated removal is invalid because the IJ did not make a finding that it was entered into knowingly, intelligently, and voluntarily. And the undisputed facts surrounding the stipulation indicate that it was in fact, not entered into knowingly, intelligently, and voluntarily. Accordingly, the government cannot prove a deportation for purposes of illegal reentry after deportation.

The government's response continues to completely ignore the plain language of the statute and regulations, the legislative history of the regulations, and the BIA decisions, which hold that the a deportation order based on a stipulation must have an IJ finding – separate from the signed stipulation – regarding a knowing and intelligent waiver.[1]

The government also ignores the undisputed facts surrounding Mr. Cesareo's stipulated removal and finds no due process concerns. By analogy, Mr. Cesareo asks the Court to imagine, a thousand inmates protesting at the MCC, stating that they have been detained for too long without ever being able to see a judge. Helicopters are over the facility, there are video cameras, and media asking questions to inmates and government officials. The government goes into the facility that same day and has over a hundred inmates sign a waiver of their rights. One of those inmates is an unsophisticated teenager. The document contains legal terminology. The teenager is not represented by an attorney. The teenager previously requested, in writing, a hearing before a judge. The process of reading and signing the waiver of rights (including the right to a hearing) and the consequences of waiving those rights takes less than five minutes. The next day, the government takes the waiver of all rights to the magistrate. There is no evidence in the magistrate's order that the teenager entered into the agreement knowingly, intelligently and voluntarily but it is assumed since the signed waiver contains those three words. Where is the due process in this process?

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[1]Mr. Cesareo further submits that *United States v. Balderas*, Case No. 06cr0522(JAH), Judge Houston held that a stipulated removal was invalid where there was no evidence of the IJ making an independent finding regarding the waiver being knowingly, intelligently, and voluntarily entered into. *See* November 20, 2006 transcripts of motion hearing attached hereto as Exhibit L . Judge Houston, however, denied the motion to dismiss holding that the defendant could not prove prejudice since prior to the stipulated removal, the defendant was deported before an immigration judge with a hearing and had multiple aggravated felonies and a criminal prosecution of Section 13326. *See id.; See also* Government's Response to Motion to Dismiss in Case No. 06cr0522(JAH) listing immigration and criminal history attached hereto as Exhibit M.

All the government does in its response is cite to *United States v. Galicia-Gonzalez*, 997 F.2d 602, 604 (9th Cir. 1993) which holds that a stipulated removal is valid when the government has presented prima facie evidence that there was a valid waiver of rights and the defendant does not present evidence to the contrary. That case is inapplicable here. ***First, the government provides no prima facie evidence of the waiver being valid.*** Its likely that the government in *Galicia-Gonzale*z was able to provide the prima facie evidence because it is a 1993 case, which means that the stipulate removal in that case had to have been signed by the defendant and his attorney who advised the defendant of the consequences of the waiver and verified by signature that the defendant entered into the waiver knowingly, intelligently and voluntarily. We don't have that here. As argued extensively in Mr. Cesareo's motion and first reply, the regulations changed in 1997 to allow unrepresented aliens to sign the stipulation of removal. *See* 8 C.F.R. 103.25(b) (attached hereto as Exhibit I) and 62 F.R. 10334 (March 6, 1997). Because the regulation now allowed for the stipulations to be entered into by unrepresented respondents, it now requires the additional step. IJs must make a factual determination as to the validity of the waiver. *Id.*

Second, even if the government has provided some prima facie evidence, which Mr. Cesareo argues it has not, **Mr. Cesareo has rebutted that presumption.** The undisputed facts surrounding his removal indicate that it was not a valid waiver. In *Galicia-Gonzalez*, the court of appeals noted that the defendant in that case did "not even alleged there was anything wrong with his deportation." *Galicia-Gonzalez*, 997 F.2d at 604. Accordingly, the government cannot claim that this case is "akin to *Galicia-Gonzalez*," [GR at 4].

The government then goes on to cite cases where criminal pleas were entered into knowingly, intelligently and voluntary through the representation of counsel but because of intervening law or change in circumstances following sentencing, the defendant seek to withdraw their waivers during the guilty pleas. GR at 5. Because of the time constraints, Mr. Cesareo will not go into detail regarding the distinguishing factors but repeats Supreme Court precedent that states that deportation "visits a great hardship on the individual and deprives him the right to stay and work in this land of freedom[,] ... [m]eticulous care must be exercised lest the procedure by which [an alien] is deprived of that liberty not meet the essential standards of fairness." *Bridges v. Wixon,* 326 U.S. 135, 154 (1945). Accordingly, the burden lies with the prosecution to demonstrate that the waiver of rights in a stipulated removal was voluntary, knowing, and intelligent. See *United States v. Lopez-Vasquez*, 1 F.3d 751, 753 (9th Cir. 1993) (per curiam) (citing *Brewer v. Williams,* 430 U.S. 387, 404 (1977) ("it [is] incumbent on the State to prove 'an intentional relinquishment or abandonment of a known right or privilege.'"). "Courts should 'indulge every reasonable presumption against waiver,' and they should 'not presume acquiescence in the loss of fundamental rights."' *Barker v. Wingo,* 407 U.S. 514, 525 (1972) (citations omitted).

B. Prejudice

If this Court finds that the stipulated removal waiving his right to an immigration hearing was invalid the next step is to determine prejudice.[2] The government does not appear to dispute that if an immigration hearing were held, Mr. Cesareo would be entitled to voluntary departure under Section 1229c(a)(1) (i.e. voluntary departure "prior to the completion of such proceedings"). But the government presents a somersault argument by claiming because Mr. Cesareo waived his right to an immigration hearing, the immigration judge could not have informed him of such relief under 1229c(a)(1). GR at 6. The obvious problem with the government's argument is that if we are at the prejudice stage of the analysis this Court has already found that the waiver of the immigration proceedings is invalid.

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[2]Mr. Cesareo contends that he need not establish prejudice following a finding of an invalid deportation. Assuming he does need to establish prejudice, it is clear that he would have been eligible for voluntary departure.

But the government only continues to confuse matters by then citing *United States v. Becerril-Lopez*, 2008 US App LEXIS 12518 (9th Cir. June 12, 2008), for the proposition that voluntary departure under 1229c(a)(1) could only have been granted prior to the filing of a Notice to Appear. What the government fails to inform the Court is that *Becerril-Lopez* dealt with a 1995 deportation and voluntary departure as it was prior to the complete overhaul of the immigration regulations in IIRAIRA. There are major distinctions between pre-IIRAIRA and post-IIRAIRA voluntary departure. Under the prior law, the only way to get pre-conclusion voluntary departure was prior to the " *initiat[ion of]* deportation proceedings" i.e. before the service of an NTA. *Contreras-Aragon v. I.N.S.*, 852 F.2d 1088, 1094 (9th Cir. 1988) (emphasis in original).

Following the 1996 IIRAIRA changes, there was a completely new statute addressing voluntary departure relief. Now under 1229c(a)(1), there are two ways to get pre-conclusion voluntary departure. The Attorney General may permit an alien voluntarily to depart, "[1] ***in lieu of*** being subject to proceedings under section 1229a of this title ***or*** [2] ***prior to*** the completion of such proceedings, if the alien is not deportatable" as an aggravated felon or under a terrorism act. 8 U.S.C. 1229c(a)(1). The government's contention that *Becerril-Lopez* and the pre-IRRIA statute somehow directs an interpretation that 1229c(a)(1) voluntary departure is only available before the Notice to Appear is misleading and in direct contradiction to case law and the plain language of the statute and regulations.

Not only is it clear from the plain language of 1229c(a)(1) that there are two time frames for receiving pre-conclusion voluntary departure, but the regulations also delineate these time frames. First, voluntary departure may be granted *in lieu of commencement of removal proceedings* by the DHS. **8 C.F.R. § 240.25(a)**. Second, an immigration judge may grant voluntary departure *prior to the completion of removal proceedings* if the alien makes a request for voluntary departure prior to or at the master calendar hearing at which the case is initially calendared for a merits hearing. **8 C.F.R. § 1240.26(b)(1)**.

Finally, faced with the fact that this case falls on all fours with *United States v. Ortiz-Lopez*, 385 F.3d 1202, 1203 (9th Cir. 2004), the government attempts to sidetrack the Court by claiming "important distinctions." GR at 8. First, Ortiz-Lopez had a hearing before an IJ and Mr. Cesareo did not. *Id.* Correct. As noted above, Mr. Cesareo argues his waiver to a hearing before an IJ was invalid and if he had one he would have been in the same position as Mr. Ortiz-Lopez. Second, the government argues because the Ninth Circuit Court of Appeals did not dismiss the indictment but rather remanded to the district court, it does not support the argument for dismissal. *Id.* The district court's denial of the motion to dismiss was reversed and it was also remanded because unlike Mr. Cesaero, Mr. Ortiz-Lopez did have criminal convictions prior to the stipulated removal. The remand was necessary to determine whether the prior conviction constituted an aggravated felony. Here, there was no prior conviction. Accordingly, the issues should be simpler in this case and Mr. Cesareo easily qualified for voluntary departure.

CONCLUSION

Because Mr. Cesareo has demonstrated that his due process rights were violated during the administrative process and he was prejudiced by the violation, Mr. Cesareo requests that this Court grant his motions.

Respectfully submitted,

//s// Zandra L. Lopez

Dated: June 20, 2008

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